

MICHELLE A. ZANE
Claimant

FIBERGLASS ENGINEERING
d/b/a COBALT BOATS
Respondent

LIBERTY MUTUAL INSURANCE COMPANY
Insurance Carrier

Claimant suffered a series of repetitive use injuries to her upper extremities while working with upholstery at Cobalt Boats. The SALJ found claimant met with personal injury by accident arising out of and in the course of her employment with respondent through a series of accidents culminating on September 5, 2002, the last day claimant worked for respondent before her surgery. The SALJ awarded claimant temporary total disability

compensation (TTD) for 82.99 weeks¹ followed by 6.9458 weeks of permanent partial disability compensation based upon a two (2) percent impairment to the body as a whole.

Respondent argues that the claimant's temporary total disability benefits should be limited to the 10.28 weeks it previously paid.² Respondent contends that claimant did not provide an off-work slip which restricted her from working during the period of time for which the additional 72.71 weeks of TTD benefits were awarded. Respondent argues claimant was not incapable of engaging in any type of gainful employment after September 17, 2002.

Claimant argues she is entitled to TTD compensation until February 9, 2004 and therefore, the SALJ's Award should be affirmed.

On February 9, 2004, claimant returned to work for respondent in an accommodated position earning more than 90 percent of her average weekly wage. The only issue before the Board is whether claimant is entitled to TTD after September 17, 2002 and if so, for what period.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the time of the injury claimant had been working for Cobalt Boats slightly more than two (2) years. She worked full time as a upholsterer. Her job involved pulling vinyl over foam pieces, making seat cushions and arm rests and using a staple gun.

Claimant said she gradually began to develop problems at the base of her right and left thumbs starting in November or December of 2001. Claimant initially thought the condition would improve but the symptoms continued to worsen.

On April 2, 2002, she was seen by the company physician, F. Allen Moorhead, Jr., M.D., who believed claimant had DeQuervain's stenosing tenosynovitis. Dr. Moorhead imposed restrictions of "[l]imited use of left hand"³ and placed her in a cast. However, claimant did not tolerate the cast well and had it removed after four (4) days.⁴

¹ The SALJ awarded 72.71 weeks of TTD in addition to the 10.28 weeks respondent indicated it had voluntarily paid. However, both parties and the SALJ apparently failed to realize that the time period for the dates respondent said it paid totaled 12 weeks, not 10.28 weeks.

² The 10.28 weeks was for May 16, 2002 to July 26, 2002 but respondent acknowledged claimant was also entitled to TTD for the 12 days of September 6, 2002 through September 17, 2002.

³ Mills Depo. at Ex. 2.

⁴ Independent Medical Examination Report from Philip R. Mills., M.D., to The Honorable Jon L. Frobish (April 30, 2003).

She was next seen by Stanley Handschy, M.D. He treated claimant with anti-inflammatory medications and recommended the use of a splint. Claimant did not think the splint helped her. There is no medical evidence in the record to reflect if Dr. Handschy imposed any kind of restrictions on claimant. Claimant was eventually taken off work and referred to Dr. Virendra C. Patel an orthopedic surgeon. Although claimant worked some between April and September of 2002, the record does not reflect the exact dates claimant worked. She did say that September 5, 2002 was the last day she worked for respondent before her surgery.⁵ Respondent paid TTD for the period of May 16, 2002 until July 26, 2002 and from September 6, 2002, to September 17, 2002.⁶ Claimant is not asking for any additional TTD for the period before her surgery, only for the period after September 17, 2002.

On September 6, 2002, Dr. Patel performed surgery on claimant's right arm. On September 17, 2002, Dr. Patel released claimant to return to work. There is no medical evidence in the record to reflect if Dr. Patel released claimant with or without restrictions. Claimant was asked if she was given restrictions by "a physician."⁷ She answered "yes" but did not know if they were permanent. She subsequently indicated that her restrictions were from Dr. King.⁸ Dr. Patel told claimant she should have surgery on the left upper extremity also. Claimant did not have the surgery on the left because she did not feel the surgery helped her any on the right upper extremity. On February 17, 2003, Dr. Patel rated claimant with a four (4) percent permanent partial impairment to the right upper extremity.⁹ Claimant last saw Dr. Patel in November of 2003.

Claimant was seen by Dr. Handschy after her surgery. Claimant testified that Dr. Handschy sent her to Dr. King in January or February 2003 and Dr. King put her on restrictions of "[m]ay work up to 4 hours a day[,]"¹⁰ limited repetitive motion and for claimant to wear a splint as needed. Respondent could not accommodate claimant with a job within Dr. King's restrictions.

Claimant testified that respondent knew she could work for four-hours a day but respondent said they had nothing she could do for four-hours a day. This discussion was

⁵ R.H.Trans. at 14.

⁶ The Regular Hearing Transcript reflects respondent only paid \$2,815.82 which would constitute an underpayment of \$502.90 for those two time periods.

⁷ R.H. Trans. at 15.

⁸ *Id.* at 22.

⁹ Independent Medical Examination Report from Philip R. Mills., M.D., to The Honorable Jon L. Frobish (April 30, 2003).

¹⁰ R.H. Trans. at 23 and Mills Depo. at Ex. 2..

in January or February 2003, and at that time claimant thought she was under a four-hour per day work restriction from an authorized treating physician.

Claimant was examined by Philip R. Mills, M.D., on April 30, 2003, for a court-ordered independent medical examination. Dr. Mills is board certified in physical medicine and as a independent medical examiner. During claimant's examination she had complaints of pain at the base of her thumbs bilaterally. She described the pain as aching. Claimant stated she cannot tell the difference between the problem she has on the right and the left side despite having the surgical procedure done on the right. Dr. Mills diagnosed bilateral DeQuervain's stenosing tenosynovitis and opined that based on claimant's evaluation, review of the medical records and claimant's history, that there is a causal relationship between claimant's current complaints and the reported work activity. Based on the *Guides*¹¹ Dr. Mills opined that claimant had a two (2) percent permanent partial impairment for each upper extremity. Using the Combined Values Chart she would have a two (2) percent permanent partial impairment to the whole person. Dr. Mills' imposed restrictions of no pinching work and said he did not believe claimant would be able to return to an upholstering type job. Dr. Mills' believed claimant to be at maximum medical improvement at the April 30, 2003 examination.¹²

Eventually, respondent notified claimant that they would accommodate Dr. Mills' restrictions. However, claimant testified that when she went back to respondent on February 8, 2004, respondent was going to put her at a buffer job that required the use of her thumbs to trigger the machine off and on and claimant felt she could not do the job due to the pinching or grasping type motion which she testified Dr. Mills prevented her from doing. Claimant also testified that after her surgery the job that respondent would have offered her was not within her restrictions. It was basically the same job she was doing before.

Claimant testified that from November 2003 until February 2004 she "basically talked to people about jobs and one of them would have been House of Schwann".¹³ Claimant said she told her attorney about the job and he said that it was beyond her restrictions. Claimant further testified that since leaving respondent's employment she has not submitted her application anywhere else for employment. She acknowledged living with and caring for her grandmother in Wichita, Kansas from mid-November 2003 through February 2004. Essentially, she was not paid other than receiving her room and board.

Temporary total disability exists when the employee, on account of the injury, has

¹¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed. rev.).

¹² Independent Medical Examination Report from Philip R. Mills., M.D., to The Honorable Jon L. Frobish (April 30, 2003).

¹³ R.H. Trans. at 18.

been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.¹⁴

Claimant was released to return to work with or without restrictions by the treating physician, Dr. Patel, on or about September 17, 2002. But claimant was not accommodated by respondent after the surgery until February 9, 2004. Claimant testified that respondent initially only offered to return her to her regular job when she was released by Dr. Patel after her surgery. It was not until February 8, 2004 that any type of accommodated work was offered and it was not until February 9, 2004 before she was actually given a job that was within her restrictions. Dr. Patel must have considered claimant to be at maximum medical improvement at least as to the right upper extremity, by no later than February 17, 2003, because he provided a permanent impairment rating on that date. Dr. Mills said claimant had reached maximum medical improvement when he saw her on April 30, 2003. Neither of those physicians restricted the number of hours claimant could work. Claimant said Dr. King restricted her to working four (4) hours per day but the record does not disclose whether that restriction was intended to be temporary or permanent, and if temporary, how long that restriction was to continue. Dr. Mills' report indicates that claimant was no longer under the care of any physician when he saw her on April 30, 2003. But it further says "[h]er restrictions are 4 hours of work per day and light duty and non-repetitive work."¹⁵ And claimant testified that she believed she was still under Dr. King's restrictions when she returned to see Dr. Patel in November of 2003. She was not sure when the four (4) hours per day restriction ended, perhaps not until she returned to work for respondent in February 2004.

Based on respondent's inability to accommodate Dr. King's restrictions, the fact that four (4) hours of work per day is not substantial gainful employment and the fact that the additional restrictions by Dr. King on the type of work claimant was able to perform severely limited the job market claimant could access, the Board finds that claimant should be awarded temporary total disability until she reached maximum medical improvement and was released to full time work by Dr. Mills on April 30, 2003.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the June 28, 2004 Award entered by Special Administrative Law Judge Vincent L. Bogart be

¹⁴ K.S.A. 44-510c(2).

¹⁵ Independent Medical Examination Report from Philip R. Mills., M.D., to The Honorable Jon L. Frobish (April 30, 2003).

modified as follows:

The claimant is entitled to 84.71 weeks of temporary total disability compensation at the rate of \$276.56 per week or \$23,427.40 followed by 6.91 weeks of permanent partial disability compensation at the rate of \$276.56 per week or \$1,911.03 for a two (2) percent functional impairment disability, making a total award of \$25,338.43.

As of January 28, 2005, there would be due and owing to the claimant 84.71 weeks of temporary total disability compensation at the rate of \$276.56 per week in the sum of \$23,427.40 plus permanent partial disability compensation at the rate of \$276.56 per week in the sum of \$23,427.40 plus permanent partial disability compensation at the rate of \$276.56 per week in the sum of \$1,911.03 for a total due and owing of \$25,338.43, which is ordered paid in one lump sum less amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of January 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carl W. Shewmaker, Attorney for Claimant
John R. Emerson, Attorney for Respondent and Liberty Mutual Ins. Co.
Vincent L. Bogart, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHELLE A. ZANE
Claimant

VS.

FIBERGLASS ENGINEERING
d/b/a/ COBALT BOATS
Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY)
Insurance Carrier)

Docket No. 1,008,499

NUNC PRO TUNC ORDER

The Appeals Board entered an Order in the above captioned matter dated January 31, 2005. The Appeals Board finds the award calculation should be corrected to read as follows:

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the June 28, 2004 Award entered by Special Administrative Law Judge Vincent L. Bogart be modified as follows:

The claimant is entitled to 44.14 weeks of temporary total disability compensation at the rate of \$276.56 per week or \$12,207.36 followed by 7.72 weeks of permanent partial disability compensation at the rate of \$276.56 per week or \$2,135.04 for a two (2) percent functional disability, making a total award of \$14,342.40.

As of February 3, 2005, there would be due and owing to the claimant 44.14 weeks of temporary total disability compensation at the rate of \$276.56 per week in the sum of \$12,207.36 plus permanent partial disability compensation at the rate of \$276.56 per week in the sum of \$2,135.04 for a total due and owing of \$14,342.40, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of February 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carl W. Shewmaker, Attorney for Claimant
John R. Emerson, Attorney for Respondent and Liberty Mutual Ins. Co.
Vincent L. Bogart, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director